TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~514~~ 290

G. JULES GERMAIN, PLAINTIFF IN ERROR,

vs.

JAMES MASON AND L. B. DUKE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED FEBRUARY 27, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 514.

G. JULES GERMAIN, PLAINTIFF IN ERROR,

vs.

JAMES MASON AND L. B. DUKE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

INDEX.

	Original.	Print.
Complaint	1	1
Demurrer	12	4
Answer of Davis	13	5
Order overruling demurrer	23	8
Answer of Germain	24	9
Replication	29	10
Motion to consolidate	32	11
Motion to require parties to litigate	33	12
Order overruling motion to consolidate	34	12
Stipulation as to amount due	34	12
Findings of court	36	13
Motion for judgment and foreclosure	39	14
Order overruling objections to findings and decree	39	14
Decree	40	14
Waiver of notice of motion for new trial	47	16
Stipulation extending time for filing motion for new trial	48	17
Order staying sale	49	17
Motion for new trial	50	17
Order to insert answer of Davis	52	18
Order overruling motion for new trial	53	18
Order for hearing upon amount of appeal bond	53	19
Order fixing amount of appeal bond	54	19
Notice of appeal	55	19
Undertaking on appeal	56	20
Assignment of judgment	59	21

PROCEEDINGS IN THE SUPREME COURT.

	Original.	Print.
Cause submitted	63	22
Judgment	64	22
Opinion	67	22
Dissent of Chief Justice Warrren	90	28
Writ of error	92	28
Undertaking on appeal	94	29
Citation	103	31
Certificate of service	104	31
Clerk's certificate	106	32

1 TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

In the district court, 3rd judicial district in and for the county and Territory aforesaid.

JAMES MASON ET AL., PL'FFS,
vs.
G. JULES GERMAIN ET AL., DEF'TS.

Be it remembered that among the records and proceedings had and done in said cause, were the following, to wit:

On the 25th day of November, A. D. 1869, said plaintiffs filed their complaint with the clerk of said court; which said complaint was in words and figures as follows, to wit:

In the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis & Clarke.

2 JAMES MASON AND L. D. DUKE, partners, doing business under the firm-name and style of Mason & Duke, plaintiffs,
against
G. JULES GERMAIN, CHARLES DAHLER, Andrew J. Davis, Henry Wyttenbach, John P. Barnes, and W. W. Arnold, William Senior, and George W. Burney, D. P. Luke, John Barnes, and W. W. Arnold, R. S. Hale, Henry Parchen, & W. S Paynter, William P. Wilder, John Murphy, Samuel Davenport, John Shively, Daniel B. Dressler, W'm B. McKillican, E. L. Curry, John Bilsland, and A. G. Clark, Thomas Conrad, and John Curtin.

The complaint of the above-named plaintiffs shows to this court that the above-named plaintiffs are partners, doing business in said county, under the firm-name and style of Mason and Duke; that on or about the third day of May, A. D. 1869, the plaintiffs made &
3 entered into a contract *and* the defendant, G. Jules Germain, whereby, in consideration of the defendant aforesaid promising to pay these plaintiffs a certain price therefor, the plaintiffs agreed to furnish large amounts of material and do a large amount of work on, in, and about, and for the construction and erection of a certain building then about to be erected by the said defendant in the town of Helena, in said county, now known as the International Hotel, situated on lots 3 & 4, and 34, in block 21, in said town of Helena, as marked, numbered, and designated on the official plat of said town, on file in the United States land office, and also in the offices of the judge of the probate court and the county clerk of said county; that, in pursuance of said contract and agreement, these plaintiffs did and performed labor & service for said G. Jules Germain, and furnished large amounts of material, all of which was done and used in the construction and erection of said building on said lots; that the price of said materials furnished and labor done as aforesaid was fixed and agreed upon by and between the plaintiffs and the said defendant previous to and at the

times the same were done and furnished, all of which was done
4 and furnished during the months of May, June, July, August, September, A. D. 1869, and the whole amount thereof was twenty-five thousand and twenty-six dollars and eighty-seven cents; that on or about the 28th day of September, 1869, an account was stated between said parties, and upon such accounting there was found to be due to the plaintiffs for work & labor and materials furnished as aforesaid, over and above all payments and offsets, the sum of six thousand six hundred and fifty-one dollars and eighty-seven cents; that the same has not been paid, nor any part thereof; and the defendant, G. Jules Germain, is now indebted to these plaintiffs for work & labor & materials furnished up to said date in said last-mentioned sum; that said building was commenced on the 9th day of May, A. D. 1869, and that the last of said labor and material was done and furnished on the 19th day of September, 1869; and that within sixty days after all of said labor was done and material furnished, to wit, on the 29th day of September, 1869, these plaintiffs, for the purpose of securing the payment of said indebtedness, filed with the recorder of said county a notice of
5 lien therefor on said premises, containing a just and true account of the demands then due and owing to them, after deducting all credits, and containing a correct description of the property to be charged with said lien, and verified by the oath of James Mason, one of the plaintiffs, a copy of which notice of lien and account is hereunto annexed, and marked "Exhibit A," to which reference is made as a part of this complaint; that during all of the time from said 9th day of May until the completion of said work, and of the furnishing of said material, the said G. Jules Germain was, and still is, the proprietor and owner of said premises, and that six months have not elapsed since the filing of said notice of lien and statement of accounts; that no proceedings at law or otherwise have been instituted for the recovery of the amount of said indebtedness secured by said lien, nor any part thereof; that the defendants, Charles Dahler, Andrew J. Davis, Henry Wyttenbach, R. S. Hale, Henry Parchen, and W. S. Paynter, (under the style of Parchen and Paynter,) and John Barnes and W. W. Arnold, claiming a joint lien, and A. G. Clarke, Thomas Conrad
6 and John Curtin, under the name and style of "Clarke, Conrad, & Curtin," and D. P. Luke, William P. Wilder, John Murphy, Sam'l Davenport, John Shively, Daniel B. Dressler, W'm McKillican, E. L. Curry, and John Bilsland, have, or claim to have, some interest, claim, or lien in or upon said encumbered premises described in the plaintiff's notice of lien aforesaid, or some part thereof, which interest, claim, or lien, if any, has accrued subsequent to the lien aforesaid of these plaintiffs.

Wherefore plaintiffs pray for judgment against said G. Jules Germain in the sum of six thousand six hundred and fifty-one dollars and eighty-seven cents, together with interest thereon at the rate of ten per cent. per annum from and after the 28th day of September, 1869, together with their cost and expenses of this suit.

And that it be further adjudged, decreed, and ordered by this court that the defendants, G. Jules Germain, Cha's Dahler, Andrew J. Davis, Henry Wyttenbach, Henry Parchen, & W. S. Paynter, John Barnes, and W. W. Arnold, and A. G. Clarke, Thomas Conrad, and John Curtin, R. S. Hale, D. P. Luke, John Barnes, and W. W. Arnold,
7 Willium P. Wilder, John A. Murphy, Samuel Davenport, John Shively, Daniel B. Dressler, W'm McKillican, E. L. Curry, and John Bilsland, and all persons whomsoever claiming under them subsequent to

the commencement of this action, be forever barred and foreclosed of all right, title, claim, lien, and equity of redemption in, on, or to said encumbered premises described in plaintiff's notice of lien aforesaid; and that said premises be decreed to be sold according to law, and the moneys arising therefrom be brought into court, and that the plaintiffs may be paid therefrom the amount that shall be due on said indebtedness and lien, with interest to the time of said payment; and the costs and expenses of this suit, so far as the amount of such moneys properly applicable thereto will pay the same; and that the defendant, G. Jules Germain, be adjudged to pay any deficiency that may remain after applying all moneys so applicable thereto, and that the plaintiff may have such other and further relief as to this court may seem just and equitable in the premises.

JOHNSTON & LOWRY,
Attorneys for Plaintiffs.

8 TERRITORY OF MONTANA,
County of Lewis & Clarke:

James Mason, being duly sworn, deposes and says, that he is one of the plaintiffs in the foregoing-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof; and that he has reason to believe, and does believe, that the matters as stated therein are true.

JAMES MASON.

Subscribed & sworn to before me this the 25th day of November A. D. 1869.

A. J. EDWARDS,
Justice of the Peace.

EXHIBIT "A."

To which reference is made in the annexed complaint as a part thereof.

TERRITORY OF MONTANA,
County of Lewis & Clark and Town of Helena:

JAMES MASON & L. B. DUKE, DOING BUSINESS under the firm-name and style of Mason & Duke,
against
G. JULES GERMAIN.

9 Know all men by these presents that we, James Mason and L. B. Duke, of Helena, in the county of Lewis & Clarke, Montana Territory, partners in the brick-laying and mason business in said town and county, have performed labor and furnished material (as such partners) for the construction of the buildings erected and now being upon the land and premises hereinafter more particularly described, as contractors. That it is our desire to avail ourselves of the benefits of the act of the legislature of the Territory of Montana, entitled "An act securing liens to mechanics and others," approved December 30th, 1864, and the act to amend an act entitled "An act securing liens to mechanics and others," approved December 6th, 1867; and that it is our intention to claim a lien upon the following-described premises, to wit: Lot No. 4, in block No. 21, fronting on Main street, in Helena, Lewis and Clarke County, Montana Territory, and also lot No. 34, in block No. 21,

in said town, and all of the interest of G. Jules Germain in lot No. 3, in block No. 21, in said town of Helena, said premises being the
10 premises upon which the International Hotel is erected, and that it is our intention to claim and hold such lien upon all the buildings, erections, and superstructures on said premises, and also upon the land upon which the same are erected, or upon such interest as the said G. Jules Germain had on the 9th day of June, A. D. 1869, when the same was commenced, or at any time since hitherto. That sixty days have not elapsed since the completion of said buildings and superstructures; that the following is a correct description of the property to be charged with said lien, to wit:

Lots Nos. 4 & 34, in block No. 21, in Helena aforesaid, and the interest and rights of G. Jules Germain in lot No. 3 in said block 21, excepting only the rights of Holzman to lower story on lot No. 3.

The following is a just and true account of the demand due to the claimants, after deducting all proper credits and offsets:

DEBITS.

Contract price for furnishing and laying in 563,880 brick in International Hotel	$22,583 62½
28,800 brick, & laying same in privy	1,140 00
Stone work on privy	528 75
11 Mason work & material in building oven range	625 00
Material & work on pavement	150 00
	$25,026 87

DEDUCTIONS.

Cr. By cash at sundry times	$18,375 00
Balance now due	$6,657 87

MONTANA TERRITORY, *Lewis & Clark County:*

James Mason, being one of the claimants in the within of intention to hold the lien named, and who subscribes the same, being duly sworn, says that he has read the same, and knows the contents thereof, and that the same is in all respects just and true, and contains a just and true account of the demand due claimants, after deducting all proper credits and offsets.

JAMES MASON.

Subscribed & sworn to before me this 29th day of Sept'r, 1869.
[SEAL.] J. H. SHOBER,
Notary Public, M. T.

[Revenue stamp.]

12 And afterwards, to wit, on the 4th day of December, 1869, said defendant filed his demurrer to said complaint, which said demurrer was in words and figures as follows, to wit:

MASON & DUKE, PLAINTIFFS
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

In the territorial district court, 3rd judicial district, Lewis & Clarke County, Montana Territory.

Now comes the above-named defendant, by his attorneys, Woolfolk

& Toole, and demurs to the complaint of the plaintiffs herein, for the following reasons, to wit:

1st. The said complaint does not state facts sufficient to constitute a cause of action.

2nd. The said complaint is ambiguous, unintelligible, and uncertain.

WOOLFOLK & TOOLE,
Atty's for Germain.

13 Service of a copy of the foregoing demurrer duly made this 4th day of December, A. D. 1869.

JOHNSTON & LOWRY,
Plff's Atty's.

And on the 8th day of January, A. D. 1870, the defendant, A. J. Davis, filed his answer to said complaint, which answer aforesaid was in words and figures following, to wit:

In district court, County of Lewis & Clarke, Territory of Montana.

JA'S MASON & L. D. DUKE
vs
G. JULES GERMAIN, ANDREW J. DAVIS, ET AL.

And now comes the above-named defendant, Andrew J. Davis, by his attorneys, Chumasero & Chadwick, and, for answer to the complaint of the plaintiffs, denies that the interest of this defendant in the premises described in the said complaint accrued subsequent to the lien of
14 the said plaintiff, which is set forth in the said complaint. And the said defendant, further answering, avers, that upon the 9th day of June, A. D. 1869, this defendant advanced and loaned to G. Jules Germain, the sum of six thousand seven hundred and ninety-two dollars, and that on the day and year aforesaid, the said Germain executed to this defendant his promissory note, and mortgage securing the same; that the said mortgage was given upon the premises described in the said complaint, as will more fully appear from the said mortgage, a copy of which is hereunto annexed, marked Exhibit "A," and made a part of this answer; and that on the day and year last aforesaid, the said mortgage was duly filed for record, and recorded in the recorder's office in and for the said county of Lewis & Clarke, in book "E," of mortgages, on pages 107, 108, 109, and 110.

And the said defendant avers that the said sum of money in the said promissory note and mortgage mentioned, was loaned by this defendant, and obtained by the said Germain for the purpose of paying off
15 and discharging all liens, claims, and demands against the said premises, and to further improve the same by erecting certain buildings thereupon. And defendant alleges, upon information and belief, that he said sum of money was so used.

That the defendant is still the owner and holder of the said note and mortgage, and that no part of the same has been paid, or the interest thereon.

And defendant avers that his interest in the said premises accrued and attached therein and thereto by virtue of the said mortgage, and the recordation thereof long prior to any interest of the said plaintiffs, and is paramount thereto.

Wherefore the said defendant demands judgment against the said

plaintiffs for his costs of suit, and for such other and further relief as may be just and equitable.

CHUMASERO & CHADWICK,
Att'ys for Def't Davis.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

16 A. J. Davis, being first duly sworn, deposes and says that he is the defendant named in the above answer; that he has heard the same read, and knows the contents thereof; that he has reason to believe, and does believe, *that* the matters as therein stated to be true.

A. J. DAVIS.

Subscribed & sworn to before me this 8th day of January, A. D. 1870.

W. F. CHADWICK,
Notary Public.

EXHIBIT "A."

This indenture, made and entered into this ninth day of June, in the year of our Lord eighteen hundred and sixty-nine, by and between G. Jules Germain, of the city of Helena, county of Lewis & Clark, and Territory of Montana, party of the first part, and Andrew J. Davis, of the county of Gallatin, & Territory aforesaid, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of six thousand seven hundred and ninety-two dollars, law-
17 ful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto him, the said party of the second part, and to his heirs and assigns, forever, the following-described property, situated, lying, and being in the city of Helena, county of Lewis & Clark, and Territory of Montana, to wit: Lot No. thirty-one, (31,) in block No. one, (1,) being twenty-two feet front on West Main street, and seventy feet deep; bounded northerly by lot No. thirty-two (32) in said block, and owned by Lee Montgomery; easterly by West Main street; southerly by lot No. thirty, and owned by James W. Whitlatch, and westerly by Clore street.

Also, twenty-five feet, more or less, fronting on Bridge street, by fifty-eight feet, more or less, being the premises formerly occupied by Mrs. Twogood as a *millernry* store, and adjoining the premises belonging to Marcus Listner.

Also, lot No. four, (4,) in block No. twenty-one, (21,) being twenty-four feet front on Main street, and ninety feet deep; said lot be-
18 ginning at a point on the east line of said Main street, twenty-five feet in a southerly direction from the corner of Wood and Main street, and running thence in an easterly direction ninety feet to the westerly line of lot No. seven (7) in said block, and owned by one Nickols; thence southerly along the westerly line of said lot No. seven (7) thirty-four feet to the northerly line of said lot No. thirty-four (34) in said block, and owned by J. T. & W. H. Parkinson; thence westerly along the northerly line of said lot No. thirty-four (34) twenty-nine (29) feet to the easterly line of lot three (3) in said block, and owned by J

L. Holtzman; thence northerly along the easterly line of said lot three (3) ten (10) feet; thence westerly along the northerly line of said lot three (3) sixty-one (61) feet to the easterly line of Main street; thence northerly along the easterly line of said Main street twenty-four (24) feet to the place of beginning; and also all that piece or parcel of ground known as lot No. three (3) in block No. twenty-one, (21,) fronting on Main street, commencing at the southwest corner of said lot, and to extend north on said Main street eighteen feet, and ex-
19 tending back the full width of the front forty-seven feet, the said last-mentioned property being the same conveyed or leased to the said party of the first part by S. L. Holtzman, and upon which the party of the first part is now erecting & constructing a hotel.

To have and to hold the said lots, pieces, or parcels of ground, together with all the improvements thereon, or hereafter to be erected or constructed upon the same, with the privileges and appurtenances thereunto belonging, unto him, the said party of the second part, his heirs and assigns, forever; provided, always—and these presents are upon this express condition—that whereas the said party of the first part has this day made, executed, & delivered unto the said party of the second part his certain promissory note for the sum of six thousand seven hundred and ninety-two dollars, due and payable eighteen months from the date thereof, with interest thereon from the ninth day of September, A. D. 1869, at the rate of four per cent. per month, payable monthly; that is to say, said first month's interest to be paid on the ninth day of October, A. D. 1869, and each and every month
20 thereafter; and, in the event the said party of the first part shall fail to pay the said interest as aforesaid, the same shall draw like interest, as the principal, until paid. Now, if the said party of the first part shall well and truly pay said note according to the tenor and effect thereof, then these presents to become null, void, and of no effect; otherwise the same to be and remain in full force and effect. And it is moreover hereby agreed that it shall be lawful for, and the said party of the second part is hereby authorized and empowered to pay off and discharge at maturity all taxes or assessments, liens, or other encumbrances now subsisting, or hereafter to be levied or imposed upon the property hereinbefore described; and, in the event that said party of the first part shall fail to insure said property with some good and reliable insurance company, then the said party of the second part, his heirs, administrators, or assigns, are hereby authorized and empowered to insure the same, and any amount so owned or paid by him for the purpose aforesaid shall be considered as, and is hereby, secured by these presents, together with interest upon the amount
21 so advanced as aforesaid, at the rate of four per cent. per month, which said amount and interest shall be paid by the said party of the first part, or deducted from the proceeds of sales of the property hereinbefore described. And it is moreover further understood that, in the event a suit for foreclosure of these presents shall be instituted, the costs and expenses incurred in the same, and sold upon any decree or judgment thereunder, as well as attorney or counsel fees, at the rate of ten per cent. upon the amount which may be found due upon said decree or judgment, as principal and interest, shall also be deducted from the proceeds of such sale, or paid by the party of the first part, as the case may be; and the residue, if any, to be paid over to the said party of the first part, his creditors or assigns.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

G. JULES GERMAIN. [SEAL.]

[$8 00 int. rev. stamp.]

Signed & sealed in presence of—
J. E. OWINGS.

TERRITORY OF MONTANA,
County of Lewis & Clark:

22 Be it remembered that, on the 9th day of June, A. D. 1869, before me, James E. Owings, personally appeared G. Jules Germain, who is personally known to me to be the person described in, and who executed the foregoing instrument of writing as a party thereto, and acknowledged that he executed the same freely & voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and notarial seal of office, at Helena City, M. T., the day and year last aforesaid.

[SEAL.] JAMES E. OWINGS,
Notary Public.

Filed & recorded June 9th, 1869, at 5 o'clock, p. m.
W. B. MORRISON,
County Recorder,
Per D. B. PERKINS, *Deputy.*

LEWIS & CLARK COUNTY,
Montana Territory, ss:

I, W. B. Morrison, county recorder in & for said county, do
23 hereby certify that the foregoing is a true & correct copy of the records of said mortgage, executed by G. Jules Germain to Alexander J. Davis, on the date thereof, and recorded in book "E," of mortgages, pages 107, 108, 109, 110 of the records of said county.

Witness my hand and seal of said county the 4th day of January, 1870.

[COUNTY SEAL.] W. B. MORRISON,
County Recorder.

[Stamp, 5 cents.]

And on the 12th day of March, 1870, the demurrer to plaintiff's complaint, aforesaid, coming on to be heard, was overruled by the court, in the words and figures following, to wit:

MASON & DUKE
vs.
G. JULES GERMAIN ET ALS.

This cause coming on to be heard upon the demurrer of the defendant, G. J. Germain, it is—

Ordered, That the said demurrer be overruled. To which ruling
24 the said defendant, by his attorney, then and there excepted, and asked & obtained leave to answer on or before the 19th day of March, A. D. 1870.

And afterwards, to wit, on the 23rd day of March, 1870, said defendant, G. Jules Germain, filed his separate answer to said complaint, which said answer was in words and figures as follows, to wit:

In the district court of the 3rd judicial district, Lewis & Clark County, Montana Territory.

JA'S MASON & L. B. DUKE, PLAINTIFFS.
vs.
G. JULES GERMAIN, DAHLER ET AL., DEFENDANTS.

Now comes G. Jules Germain, one of the above-named defendants, by his attorneys, Woolfolk & Toole, and for separate answer to the complaint of the plaintiffs—

Denies that the price of the materials furnished and labor done was fixed and agreed upon between the plaintiffs and this defendant previous to, and at the time the same were done & furnished, and denies that the whole amount thereof was twenty-five hundred & seventy-
25 six dollars and eighty-seven cents; denies that all said work, and labor, and material furnished by plaintiffs was done and used in the construction of the building known as the International Hotel, as charged in plaintiff's complaint; denies that on or about the 28th of September, A. D. 1869, an account was stated between the plaintiffs and defendants, or that, upon such accounting there was found to be due to the plaintiffs for work, and labor, and materials furnished, over and above all payments and offsets, the sum of six thousand six hundred & fifty-one dollars & eighty-seven cents; denies that said plaintiffs at the date mentioned in their said complaint, or at any other time, filed their notice of lien upon said property in pursuance with the statutes in such case made and provided, and avers that said plaintiffs have and hold no good & valid lien upon the same. Defendant for further answer admits that, on or about the date mentioned in said complaint, he contracted with said plaintiffs to do and perform certain work and services in and about the construction and erection of said
26 building, and states that, by the terms of said contract, said plaintiffs agreed to do and perform said work & services in a good, workmanlike manner, and that, upon the completion thereof this defendant was to pay said plaintiffs as a consideration therefor the sum of twenty-five thousand one hundred and one & $\frac{50}{100}$ dollars, in gold dust; that said plaintiffs by their said contract were to complete and finish the hall leading into Bridge street, the kitchen, & privy to said building; that the same was to be plastered; that said plaintiffs at the time of commencing this action had not, and have not yet, completed the same so contracted to be done by them as aforesaid, by reason of which defendants deny said plaintiffs' right to recover upon said contract; that said plaintiffs were to construct and erect a bake-oven & range in and to said hotel in a good, workmanlike manner; that said plaintiffs so unskilfully & negligently erected and constructed the same as that it was wholly useless to this defendant, by reason
27 of which he was damaged in the sum of five hundred dollars; that the flues contracted to be erected and constructed as aforesaid, were also so negligently & unskilfully erected & constructed as to be almost useless for the purposes intended, by reason of which defendant has been damaged in the sum of five hundred dollars; that the walls in and about said building, contracted to be constructed and erected in a good, workmanlike manner, were unskilfully & negligently erected & constructed as not to present an uniform appearance, & were not such as plaintiff contracted to erect; that, by reason thereof, and other negligent work of said plaintiffs in and about divers other parts and portions of said building, and comprised in said contract, the

defendant has been damaged in the sum of one thousand dollars. Defendant further says that he paid said plaintiffs on said work and labor the sum of twenty thousand five hundred & seventy-one $\frac{50}{100}$ dollars in gold dust; that had said contract been completed according to the terms thereof, this defendant would have been indebted to said
28 plaintiffs in the sum of $4,529 36, in gold dust; that the said damages claimed by this defendant, to wit, $2,000, is likewise computed in gold dust; that he made no other contract or agreement with said plaintiff.

Wherefore he asks judgment for his costs and disbursements of this action.

WOOLFOLK & TOOLE,
Att'ys for Def'ts.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

G. Jules Germain makes oath and says that he has heard the foregoing answer read, and knows the contents thereof; that he has reason to believe, & does believe, the matters therein stated to be true.

G. JULES GERMAIN.

Subscribed and sworn to before me this twenty-third day of March, A. D. 1870.

MASSENA BULLARD. NOTARIAL SEAL. MONTANA TERRITORY.

MASSENA BULLARD,
Notary Public.

29 And afterwards, to wit, on the 24th day of March, 1870, said plaintiffs filed their replication to said answer, which said replication was in words & figures as follows, to wit:

In third judicial district court, Lewis & Clark County, Montana Territory.

JAMES MASON & L. B. DUKE, PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

Now come the plaintiffs & for replication herein to G. Jules Germain's seperate answer herein.

Deny that these plaintiffs contracted with said defendant to construct said building as in defendants' answer aver'ed for the sum of twenty-five thousand one hundred & one $\frac{50}{100}$ dollars in gold dust, nor any other number of dollars in gold dust, and deny that by the terms of any contract made with defendant, these plaintiffs were to complete the hall leading into Bridge street, nor the kitchen nor privy to said
30 building, nor that the same were to be plastered; & deny that these plaintiffs had not completed the contract sued upon at the time of the commencement of his action; and deny that by said contract these plaintiffs were to erect a bake-oven and range in and to said hotel; and deny that plaintiffs performed any unskilful work nor labor for defendant, by which defendant was damaged in the sum of five hundred dollars, nor any other sum; and deny that any flues were negligently nor unskilfully erected nor constructed by plaintiffs for defendant by reason of which defendant has been damaged in the sum of five hundred dol-

lars, nor any other sum; and deny that the walls in and about said building contracted to be constructed by these plaintiffs for said defendant, were constructed unskilfully and negligently; and deny that they were not constructed as these plaintiffs agreed with defendants to construct the same, and deny that they are not of an uniform appearance, and deny that there was any negligent nor unskilful work done by these plaintiffs for said building, whereby said defendant has been damaged in the sum of one thousand dollars, nor in any other sum;
31 and these plaintiffs deny that they performed any negligent nor unskilful work for said defendant in nor about said building, but aver that they performed all their work in and about said building for said defendant in a good and workmanlike manner and in accordance with these plaintiffs' contract with said defendant.

Wherefore plaintiffs demand the relief in plaintiffs' complaint prayed for.

SHOBER, LOWRY & JOHNSTON,
Pl'ffs' Att'ys.

MONTANA TERRITORY,
Lewis & Clark County:

James Mason being duly sworn, says he is one of the plaintiffs in the foregoing action, and that he has heard read the foregoing replication, and knows the contents thereof, and that the same is true of his own knowledge.

JAMES MASON.

Subscribed & sworn to before me this 23rd day of March, A. D. 1870.

T. J. LOWRY. NOTARIAL SEAL. MONTANA.

THO'S J. LOWRY,
Notary Public, M. T.

32 Service of copy admitted, March 24th, 1870.
WOOLFOLK & TOOLE,
Def't Germain's Att'ys.

And on the 5th day of April, 1870, the defendant G. Jules Germain, filed in the case of "Senior & McBurney vs. G. Jules Germain," a motion to consolidate the actions instituted in the above cause, which motion relates also to this case of Mason & Duke vs. Germain, and is in the words & figures following, to wit:

SENIOR & MCBURNEY, PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

In the district court, 3rd judicial district in and for the county of Lewis & Clark, & Territory of Montana.

Now comes the defendant G. Jules Germain by Woolfolk & Toole, his attorneys, and moved the court to consolidate the actions instituted by the defendants in the above-entitled cause, and that the matters
33 in issue to be adjusted therein be embraced in a single decree.

This motion is based upon the papers and pleadings in this action, and the respective pleadings of the said defendants in their seperate actions, which are now on file in this court.

WOOLFOLK & TOOLE,
Def't Germain's Attorneys.

And on the same day, viz., the 5th day of April, A. D. 1870, the defendant G. Jules Germain filed in the case of "Senior & McBurney vs. G. Jules Germain," a motion to cause all the defendants in the above cause to litigate their respective rights therein, which motion relates also to this case of "Mason & Duke vs. Germain," and is in the words and figures following, to wit:

SENIOR & MCBURNEY, PLAINTIFFS.
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

Now comes the defendant G. Jules Germain & moves the court
34 to cause all the defendants in this action to litigate their respective rights therein.

WOOLFOLK & TOOLE,
Def'ts Att'ys.

And on the same day, viz, the 5th day of April, A. D. 1870, an order was entered overruling defendant Germain's motion to consolidate the several actions in this cause, which order is in the words & figures following, to wit:

Ordered, that the said motion be overruled. To which ruling the said defendant Germain, by his attorneys, at the time, excepted.

And afterwards, to wit, on the 7th day of April, A. D. 1870, said plaintiffs & defendant filed their stipulation in this cause as to amount due, which said stipulation was in words and figures as follows, to wit:

APRIL 7TH, 1870.

In sundry cases against G. Jules Germain et al., the defendant Germain agrees as follows, viz:

That in the case of Mason & Duke vs. G. Jules Germain et al.,
35 said Germain agrees that the court may find that the plaintiffs had finished their work & furnished their material in pursuance of their contract, and that there is due said plaintiffs the sum of five thousand & twenty-nine dollars, which sum is to be recouped by such damages as the court may find that said defendant has sustained by reason of a certain bake-oven & flue and range constructed by said plaintiffs under said contract.

That there is due:

Curry	$859 37
Wilder	1,505 70
Dressler	378 50
Davenport	465 06
Shively	387 47½
Clarke et al	607 20
Daily	571 63

WOOLFOLK & TOOLE,
Def't Germain's Att'ys.

Accepted by the plaintiffs—
JOHNSTON & LOWRY, AND J. H. SHOBER,
Att'ys for Pl'ffs.

And afterwards the cause coming on to be heard upon the stipulation & admissions of the defendant that the copy of the lien
36 filed with the complaint in said cause was a correct copy, & which was admitted in lieu of the original lien, said defendant reserving in open court all objections to plaintiffs' lien & rights of lien, the plaintiffs then introduced James Mason as a witness in their own behalf as to the matters to be litigated under said stipulation, who, with all the other witnesses, testified only upon said matter in dispute, upon which the court allowed $75, as damages on account of the defective range & flue therein mentioned, and afterwards, to wit, on the 11th day of April, 1870, said court upon the foregoing facts filed the following findings, to wit:

In 3rd judicial district court, Lewis & Clarke County, M. T.

MASON & DUKE, PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

This cause came on for trial this 6th day of April, A. D. 1869, before the court, upon the pleadings in said cause & admitted facts, and
37 testimony, jury having been expressly waived by party plaintiffs & defendants.

After testimony closed, case was submitted to court without argument. Court finds as follows:

1. That the plaintiffs did and performed work and labor, and furnished material for said defendant, G. Jules Germain, as in complaint aver'ed, and on the premises therein described, and that there is now due the said plaintiffs from said defendant, G. Jules Germain, therefor, $5,215 $\frac{46}{100}$ dollars.

2. That the building on said premises, upon which plaintiffs labored & for which they furnished material, was commenced on the 21st day of May, A. D. 1869, and that plaintiffs furnished brick on the premises on the 8th day of June, A. D. 1869, for defendant G. Jules Germain, and commenced the construction of the wall of said building after foundation was laid, before 12 o'clock m., of the 9th day of June, A. D. 1869.

3. That plaintiffs filed their lien for the amount claimed due, upon the premises described in plaintiffs' complaint, on the 29th
38 day of September, A. D. 1869, at 2¼ o'clock p. m., of said day, in the county clerk's office of Lewis & Clark County, M. T., as required by law.

4th. The court therefore orders that judgment be entered in favor of said plaintiffs and against said defendant, G. Jules Germain, for the sum of five thousand two hundred and fifteen $\frac{46}{100}$ dollars, and for costs of suit, & that plaintiffs have decree of lien upon the premises described in said complaint, as prescribed by law.

Given under my hand this 9th day of April, A. D. 1870.

G. G. SYMES,
Judge of 3rd Judicial District Court, M. T.

To which findings aforesaid defendant then and there excepted.

And afterwards, to wit, on the 13th day of April, 1870, said plaintiffs filed their motion for judgment and decree herein, which was in words and figures as follows, to wit:

39 In 3rd judicial district court Lewis & Clarke County, M. T.

MASON & DUKE
vs.
G. JULES GERMAIN ET AL.

Now come the plaintiffs in the above-entitled cause, by their attorneys, and move for judgment & foreclosure of lien herein upon the pleadings, special findings, and proofs herein.

JOHNSTON, LOWRY & SHOBER,
Pl'ffs Att'ys.

And on the 19th day of April, A. D. 1870, an order was entered, over-ruling defendant Germain's objections to "findings and decree," which order is in words and figures, as follows, to wit:

MASON & DUKE
vs.
G. JULES GERMAIN ET AL.

40 The defendant Germain's objection to the findings & decree herein, upon the stipulation on file and admission that the lien filed in this case is a copy of the original lien therein, being taken up & considered, was overruled by the court; to which ruling the said defendant Germain, by his attorneys, then and there excepted.

And afterwards, to wit, on the 20th day of April, 1870, the court sustained the plaintiffs' motion aforesaid, for decree, and rendered and signed a decree, which said decree was in words and figures as follows, to wit:

In the district court of the third judicial district of the Territory of Montana, within and for the county of Lewis & Clarke.

JAMES MASON & L. D. DUKE, PARTNERS DOING business under the firm-name & style of Mason & Duke, plaintiffs,
vs.
41 G. JULES GERMAIN, CHARLES DAHLER, Andrew J. Davis, Henry Wyttenbach, John P. Barnes, W. W. Arnold, William Senior, George McBurney, D. P. Lake, R. S. Hale, Henry Parchen, W. S. Paynter, W'm P. Wilder, John Murphy, Sam'l Davenport, John Shively, Dan'l B. Dressler, W'm B. McKillican, E. L. Curry, John Bilsland, A. G. Clarke, Thos. Conrad, & Jno. Curtin, defendants.

The summons in this action having been regularly served on the defendants, G. Jules Germain, Chas. Dahler, Andrew J. Davis & Henry Wyttenbach, and all of the other defendants above named having appeared & waived service, and default having been regularly entered against all of the defendants in this action, except the defendants G. Jules Germain & Andrew J. Davis, and this cause, as between the plaintiffs & the said G. Jules Germain & Andrew J. Davis, defendants, depending separately, came regularly on for trial on the 6th day of

April, 1870, in this court, Johnston, Lowry & Shober appearing
42 as counsel for the plaintiffs, & Chadwick & Chumasero for the defendant Andrew J. Davis, & Woolfolk and Toole for the defendant G. Jules Germain. A trial by jury having been expressly waived by counsel for the respective parties, the cause was tried by the court, sitting without a jury. Whereupon the evidence of the respective parties was submitted to the court; which evidence being closed, the cause was submitted to the court for consideration & decision, & after due deliberation the court delivers its findings & decision in writing, which is filed, & orders that judgment be entered in accordance therewith.

Wherefore, by reason of the premises & the law, it is ordered & adjudged that the plaintiff James Mason and L. D. Duke do have & recover from the defendant G. Jules Germain, the sum of five thousand two hundred and fifteen dollars & forty-six cents ($5,215 46) with interest thereon at the rate of ten per cent. per annum from the date hereof, till paid, together with said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of eighty-one $\frac{85}{100}$ dollars. And it is further ordered, adjudged and decreed that in case no sufficient other property of the said defendant, G. Jules Ger-
43 main, be found to satisfy this judgment, then the residue thereof shall be levied out of the encumbered property mentioned & described in the plaintiffs' complaint, & hereinafter set forth, & that all of said premises, or so much thereof as shall be necessary to raise the amount due to the plaintiffs for principal, interest, costs of suit and expenses of sale, be sold at public auction by or under the direction of the sheriff of the county of Lewis & Clark aforesaid, where said mentioned premises are situate, and that the sheriff give public notice of the time & place of such sale, according to the course & practice of this court, and the laws relative to the sale of real estate under execution, and in all respects concerning such sale conform to said practice & laws, and that the plaintiffs, or either of them, any party to this suit, may become the purchases at such sale; that the sheriff out of the proceeds of such sale, retain his lawful fees & commissions, & pay to the plaintiffs or their attorney the full amount due on said judgment, including interest & costs as aforesaid, or so much thereof as said pro-
44 ceeds will pay, & take receipts for the same, and return the same with his report of such sale to this court, and that he brings the surplus money, if any there be arising from such sale, into this court, to abide the order of the court.

That the defendants, G. Jules Germain, Andrew J. Davis, Chas. Dahler, Henry Wyttenbach, R. S. Hale, Henry Parchen, W. S. Paynter, A. G. Clarke, Thomas Conrad, John Curtin, D. P. Lake, Wm. P. Wilder, John Murphy, Sam'l Davenport, John Shively, Dan'l B. Dressler, W'm McKillican, E. L. Curry, Jno. Bilsland & John Barnes & W. W. Arnold, so far as relates to a notice of lien claimed by said Barnes & Arnold on said premises, and filed in the office of the clerk of said county on the 11th day of November, A. D. 1869, for the amount of $1,037 87 dollars, and that all persons claiming, or to claim, by, through, or under them, or either of them, and all persons having liens subsequent to the date of filing the lien mentioned in the plaintiffs' complaint, to wit, the 29th day of September, A. D. 1869, at 2¼ o'clock, in the afternoon of said day, & all persons having liens by judgment, decree, mortgage, deed or conveyance of any kind whatsoever accruing subsequent to the 8th day of June, A. D. 1869, upon, against or
45 for said property described hereinafter, and their personal repre-

sentatives, and grantees, and all persons claiming by, through, or under them, or either of them, be forever barred & foreclosed of and from all claim, demand, title & equity of redemption of, in, & to said premises, and every part & parcel thereof, from, and after the date of the delivery of the sheriff's deed to the purchaser or purchasers under this order of sale.

And it is further adjudged and decreed that the purchaser or purchasers of said premises at such sale be let into possession thereof, upon the presentation of the sheriff's deed therefor, and that any of the parties to this action hereby foreclosed of the same, or their heirs, or assigns who may be in possession thereof, deliver possession thereof to any purchaser or purchasers upon such sale. The description of the property hereby authorized to be sold under & by virtue of this decree, and the hereinbefore-named premises is, as follows, to wit: Lots number three, four, & thirty-four in block number 21, saving the rights of
one Holzman in said lot No. 3; also all of the buildings & super-
46 structures on said lots, the said building & superstructure being a building known as the International Hotel, saving the rights of one Holzman to lower story on lot No. 3 aforesaid, all situated in the town of Helena, in the county of Lewis & Clark, in the Territory of Montana as marked, numbered, & designated in the official plat of said town of Helena, on file in the office of the clerk & recorder of said county.

Given under my hand this 18th day of April, A. D. 1870.

G. G. SYMES,
Judge 3rd Judicial District, Montana Territory.

Sheriff $25 05; witness 15 80; clerk 41 00—$81 85.

And afterwards, to wit, on the 20th day of April, 1870, said plaintiffs filed their stipulation in open court, waiving notice of motion for
47 a new trial herein, which said stipulation was in words and figures as follows, to wit:

W'M SENIOR ET AL., PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

In the district court, third judicial district, in and for the county of Lewis & Clarke, and Territory of Montana.

Notice of motion for new trial and sufficiency thereof, waived in all cases wherein we are attorneys for plaintiff, against G. Jules Germain, in actions upon mechanics' liens upon the International Hotel, and in which findings & decrees & verdicts have been rendered during this term of the court.

SHOBER & LOWRY.
JOHNSTON.
J. J. WILLIAMS.
R. E. ARICK.
J. D. RITCHIE.

The above motion in the case of Senior & McBurney vs. Ger-
48 main relates also to this case of Mason & Duke vs. Germain.

And afterwards, to wit, on the day and year last aforesaid said plaintiffs also filed their stipulation extending the time for filing motion,

statement, and specification for new trial until the 25th of May, 1870, which was so ordered by the court, and which said stipulation and order were in words and figures, as follows, to wit:

SENIOR & MCBURNEY, PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

It is hereby stipulated and agreed that the defendant, G. Jules Germain, have until the 25th day of May, 1870, to prepare & file his motion and statement for new trial (in pursuance with notice heretofore waived) in all the mechanics' lien cases against the International Hotel in which we are attorneys for plaintiffs.

JOHNSTON, LOWRY & SHOBER.
J. J. WILLIAMS.
49 CHUMASERO & CHADWICK.
R. E. ARICK.

(The above stipulation in the above case of "Senior & McBurney" relates also to this case of Mason & Duke vs. Germain.)

And on the 21st day of April, A. D. 1870, the following order staying sale of premises aforesaid was made and entered, which order is in the words and figures following, to wit:

MASON & DUKE
vs.
G. JULES GERMAIN, ET AL.

Now comes G. Jules Germain one of said defendants by his attorneys & enters a verbal motion for an order to stay proceedings upon the judgment & decree entered in this action, until his motion for a new trial is heard and determined; whereupon by agreement of the parties it is

Ordered, That a sale of the property under the judgment & decree be stayed until the 10th day of June, A. D. 1870, & that this order
50 shall not prevent the issuance of a special "fieri facias" and the advertisement of sale thereunder to take place at that or any later.

JAMES MASON ET AL., PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

And now comes said defendant, G. Jules Germain, and in pursuance with the stipulations on file in this cause, and orders of the court thereupon made, & files this his motion, statement & specifications for a new trial herein, & shows unto the court as follows, to wit:

1st. Irregularities in the proceedings of the court, and orders thereof, by which this defendant was prevented from having a fair trial.

In this, to wit:

The court erred in overruling defend'ts demur'er to the complaint of the plaintiffs.

The court erred in overruling def'ts motion to consolidate and require the parties all to litigate their rights in one action.

51 The court erred in rendering a decree herein & overruling defendants objections to the findings & decree.

2nd. Insufficiency of the evidence to support the findings of the court & decree rendered therein.

In this, to wit:

The evidence shows that there was no account stated as charged in said complaint.

The evidence shows that there was no lien filed in accordance with the statute in such case made and provided.

The stipulation & lien being all the evidence before the court, are insufficient to sustain the findings and decree.

The evidence shows that no correct account was filed as required by law.

The evidence does not show that any lien was filed within the time required by law.

The findings are insufficient to sustain the decree herein.

There is a variance between the evidence & findings, and the decree and pleadings herein.

The evidence does not warrant the court in finding the amount for which the decree was rendered herein, nor was said findings or
52 decree filed within the time so required by law.

WOOLFOLK & TOOLE,
Def't Germain's Attorneys.

Statement settled as correct, May 6th, 1870.

G. G. SYMES, *Judge.*

And on the 6th day of June, 1870, at a special term of said court, an order was entered to insert the answer of the defendant Davis therein, which order is in the words & figures following, to wit:

MASON & DUKE
vs.
G. JULES GERMAIN ET AL.

This cause came on to be heard upon defendant Germain's motion & statement for a new trial & amendments thereto, pending the settlement of the said statement, it is agreed by the parties, Germain & Davis, in open court under protest of plff's atty's, that the answer of defendant Davis shall be inserted therein; it is also further agreed
53 by the parties in open court that the statement herein this day settled by the court may be used in passing on the motion for new trial, waiving the necessity of engrossing the same until after the court shall hear & pass upon said motion for new trial; and all objection thereto waived, and upon a hearing of said motion being had, it is,

Ordered, That the same be, and is hereby, overruled & denied; to which ruling the defendant Germain, by his att'ys, then & there excepted.

And afterwards, to wit, on the 7th day of June, A. D. 1870, an order was entered for hearing upon the amount of appeal bond, which order is in words & figures as follows, to wit:

MASON & DUKE
vs.
G. JULES GERMAIN ET AL.

Ordered, That defendant Germain's motion to fix the amount of bond on appeal to stay the sale of the property mentioned in plaintiff's complaint be assigned to to-morrow, at 10 o'clock a. m., for hearing.

54 And afterwards, to wit, on the 8th day of June, 1870, an order was entered fixing the amount of appeal bond, which order is in words & figures as follows, to wit:

MASON & DUKE
vs.
G. JULES GERMAIN ET AL.

Defendant's motion to fix the amount of the undertaking to stay the sale of the property described in the complaint herein coming on to be heard, it is

Ordered, That a stay of such proceedings & sale be had upon the execution and filing of an undertaking to stay waste, in the sum of at least one-half of the amount of the judgment & costs in said cause, together with the usual three hundred dollars, undertaking for costs.

And on the same day, to wit, the 8th day of June, A. D. 1870,
55 the defendant G. Jules Germain filed his notice of appeal, which notice is in words & figures as follows, to wit:

MASON & DUKE, PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

In the district court, 3rd judicial district in & for the county of Lewis & Clark, and Territory of Montana:

To the above-named pl'ff & the clerk of said court, & Johnston, Lowry & Shober, plaintiffs' attorneys.

You will take notice that the defendant Germain appeals from the findings filed on the 11th day of April, judgment & decree filed on the 20th day of April, & the order overruling the motion for a new trial in the above-entitled cause, made on the 6th day of June, A. D. 1870, and the whole thereof, to the supreme court of this Territory, dated this 7th day of June, 1870.

WOOLFOLK & TOOLE,
Att'ys for Def't and Appellant.

56 Service of a copy waived this 7th day of June, 1870.
JOHNSTON, LOWRY & SHOBER,
Att'ys for Respondent.

And afterwards, to wit, on the 9th day of June, 1870, the plaintiff Germain filed his undertaking on appeal, which undertaking is in words & figures as follows, to wit:

MASON & DUKE, PLAINTIFFS,
vs.
G. JULES GERMAIN ET AL., DEFENDANTS.

In the district court, 3rd judicial district in & for the county of Lewis & Clark, and Territory of Montana:

Whereas G. Jules Germain has appealed to the supreme court of this Territory from a judgment & decree rendered in said cause in favor of the plaintiffs therein on the 20th day of April, A. D. 1870, for the sum of five thousand two hundred & fifteen dollars & forty-six cents, with the costs therein, & also from the order of the court overruling his motion for a new trial, made & entered on the 6th day of June,
57 1870: Now, therefore, we, the undersigned, in consideration of the premises & of such appeal, do hereby jointly & severally undertake & promise, on the part of the appellant, that the said appellant will pay all costs & damages which may be awarded against him on said appeal, not exceeding the sum of three hundred dollars, to which amount we acknowledge ourselves jointly & severally bound.

And whereas the said defendant is also desirous of staying the execution of the judgment and decree appealed from, in so far as it relates to the sale of certain premises known as the International Hotel, and more particularly described in said judgment and decree, we do, therefore, in consideration thereof, and of the premises, jointly and severally undertake & promise, & do acknowledge ourselves jointly & severally bound in the further sum of twenty-seven hundred dollars, (being the amount for that purpose fixed by the judge of the court,) that during the possession of said property by the appellant, he will not commit, or suffer to be committed, any waste therein not exceeding the said sum of twenty-seven hundred dollars, so as aforesaid fixed by the
58 judge of this court, by which the said judgment & decree was rendered, dated this 9th day of June, 1870.

CHAS. L. DAHLER. [SEAL.]
P. A. LARGEY. [SEAL.]

TERRITORY OF MONTANA,
County of Lewis & Clark, ss:

Chas. L. Dahler and P. A. Largey, the persons named in, & who subscribed the foregoing undertaking, as sureties thereto, being severally duly sworn, each for himself says that he is worth the amount specified in said undertaking as the penalty thereof, over & above all his debts & liabilities, exclusive of property exempt from execution.

CHAS. L. DAHLER.
P. A. LARGEY.

Subscribed & sworn to before me this 9th day of June, 1870.

MASSENA BULLARD,
NOTARIAL SEAL,
MONTANA TERRITORY.

MASSENA BULLARD,
Notary Public.

Approved June 9, '70.

G. G. SYMES, *Judge.*

59 And afterwards, to wit, on the 14th day of June, A. D. 1870, an assignment of judgment was filed with the clerk of this court, which assignment is in words & figures as follows, to wit:

Know all men by these presents, that we, James Mason & L. B. Duke, composing the firm Mason & Duke, both of the county of Lewis & Clarke, & Territory of Montana, for & in consideration of the sum of twenty-seven hundred & fifty-one $\frac{15}{100}$ dollars to us in hand paid by the banking-house of Hussy, Dahler & Co., the receipt whereof is hereby confessed & acknowledged, have granted, bargained, sold, assigned, and transferred unto the said Hussy, Dahler & Co., a judgment and decree duly rendered in our favor against G. J. Germain, on the eighteenth day of April, A. D. 1870, in the district court of Lewis & Clark County, Montana Territory, for the sum of five thousand two hundred & fifteen $\frac{46}{100}$ dollars, ($5,215 46,) besides $81 25 costs, all bearing interest at the rate of ten per cent. per annum from the date thereof, said judgment & decree being rendered in the suit wherein the said firm of
60 Mason & Duke were plaintiffs, & G. Jules Germain et al. were defendants, & being moreover for the enforcement of a mechanics' lien upon lots 3, 4, & 34, in block number 21, in the said town of Helena, & Territory of Montana, having thereon the premises known as the International Hotel.

And we do authorize & direct the said Hussy, Dahler & Co. to collect said judgment in the manner provided by law or otherwise, & to prosecute all actions necessary for the collection thereof. To have & to hold the aforesaid judgment and decree unto the said Hussy, Dahler & Co., their heirs and assigns, forever.

In witness whereof we have hereunto set our hands & seals this 13th day of June, A. D. 1870.

JAMES MASON. [SEAL.]
L. B. DUKE. [SEAL.]

[Five dollars int. rev. stamps.]

Signed, sealed, and delivered in the presence of—
J. E. SHAW.
W. F. TRUETT.

[Fifty cents int. rev. stamps.]

61 In district court, 3d judicial district.

TERRITORY OF MONTANA, *County of Lewis & Clark:*

I, Chas. W. Fowler, clerk of the said district court, do hereby certify that the foregoing sixty pages, numbered from one to sixty, inclusive, contain a true, full, and correct transcript on appeal, of the papers, orders, and proceedings on file and of record in my office in the case of James Mason & others, against G. Jules Germain and others.

Witness my hand & the seal of said court this 1st day of July, A. D. 1870.

[SEAL.] CHAS. W. FOWLER, *Clerk.*
By CHAS. G. REYNOLDS, *Dep'ty Clk.*

Filed in the office of the clerk of the supreme court of Montana Territory, July 30th, A. D. 1870, at 10 o'clock a. m.

J. R. ALDIN, *Clerk.*

62

63 In the supreme court of the Territory of Montana, August term, A. D. 1870.

MASON AND DUKE, RESPONDENT,
vs.
G. JULES GERMAIN ET AL., APPELLANTS.

Appeal from the third judicial district of said Territory.

Be it remembered, that on the twenty-second day of August, A. D. 1870, at a regular term of said supreme court, the above-entitled cause came on regularly to be heard on the said appeal, and the said cause was fully argued by the counsel for the respective parties and submitted with briefs.

64 And afterwards, to wit, on the 15th day of November, A. D. 1870, at an adjourned sitting of said supreme court, the said cause coming on for judgment on the appeal thereof, and the errors assigned on said appeal having been previously argued by counsel, and the court being fully advised as to the law in the case, on consideration whereof: It is ordered, adjudged, and decreed by the court that said cause be remanded to the court below, and the judgments entered in favor of the plaintiffs and the several defendants therein for the respective amounts found due to them, be, and the same are hereby affirmed, and the costs of filing the several complaints as answers in said cause, and serving copies of the same, and such costs as were necessarily incurred by them in defense and assertion of their several rights in this proceeding

65 shall be ascertained and taxed by the court. And it is further ordered and adjudged that the appellants, Germain and Davis, respectively, recover from the several defendants herein the costs and charges incurred by them in answering and defending the several separate proceedings herein specified, to be taxed by the court. It is further ordered, that special fieri facias executions issue in favor of said several parties for the said amounts for which said judgments were rendered, and their costs, by the court, if such executions have not heretofore issued, and that if no sufficient property of defendant Germain has been or can be found to satisfy the said several judgments and costs taxed, that then the residue of such judgments, or any of them, be levied out of said property described in the complaint, and that

66 said property, or so much thereof as may be necessary, be sold in accordance with law in order to satisfy the same, and that out of the proceeds of such sale there be paid the costs of suit and of sale, and thereafter the said judgments be paid and satisfied to the extent of such proceeds, in the order of filing the said several accounts and notices of lien in the recorder's office, as found by the court; and that said several liens so found by the court be decreed to be prior and paramount to the mortgage executed by appellant Germain to appellant Davis, mentioned and set out in the answer of said Davis, and that the surplus, if any, be brought into court to await its further order.

67 And afterwards, to wit, on the 15th day of November, A. D. 1870, the said supreme court filed its written opinion in said cause, of which, in words & figures, the following is a copy, to wit:

In the supreme court of the Territory of Montana, of the August term thereof, A. D. 1870.

JAMES MASON AND L. D. DUKE, PARTNERS, under the name and style of Mason & Duke, respondents,
vs.
G. JULES GERMAIN ET AL., APPELLANTS.

Appeal from Lewis & Clark County.

On the twenty-fifth day of November, A. D. 1869, the respondents filed their complaint in the district court of the 3rd judicial district, in and for Lewis & Clark County, to enforce a lieu for work done and materials furnished by plaintiffs upon and for a certain building erected upon certain lots situated in the town of Helena, described
68 in the complaint, under a contract with the owner, G. Jules Germain, one of the defendants. The other defendants are mnde parties to the proceeding, upon the ground of interest in the property sought to be charged, claimed by them respectively, which is alleged to have accrued subsequent to plaintiff's lien. It does not appear that summons issued, but defendants Davis & Germain answered seperately, and the court finds in the judgment rendered that all the defendants except Germain, Davis, Dahler, and Wyttenbach, appeared to the action, waived service of summons, and that default was regularly entered against them respectively. After appearance of a defendant in an action, default cannot be entered against him, but judgment can be rendered by "nil dicit," or for want of answer, and such is substantially the course pursued in this case.

69 On the same day, November 25th, 1869, John Bilsland, one of the defendants in this suit, filed his complaint in the same court to enforce a mechanic's lien upon the same building and lots, making the plaintiffs in this suit, together with his co-defendants herein, parties defendant in that proceeding, and on the same day defendants Clark, Conrad & Curtin commenced a proceeding in the same court, for the purpose of enforcing a lien for materials furnished for the same building, and in which the same parties are impleaded.

On November 27th, 1869, W'm P. Wilder, John Shively, D. B. Dressler, Samuel Davenport, and E. L. Curry, respectively; and on November 29, 1869, Barnes and Arnold, as partners; and on December 14, 1869, R. S. Hale; and on February 10, 1870, Benjamin Daily; and on February 12, 1870, D. B. McKillican, each being a defendant in this suit, seperately commenced a suit to enforce their several liens
70 against the same property, and impleading the parties to this suit, in each proceeding. Afterwards such proceedings were had in each one of said suits, that judgment was rendered in favor of the respective plaintiffs, and in each case a seperate decree of sale of the property was entered to satisfy the lien found.

In each one of these several proceedings defendant Germain entered a motion for an order to consolidate these actions, and also to require the plaintiffs therein to litigate their respective claims in one action, and that all matters adjudged between the parties should be embraced in one decree. These motions were each overruled by the court.

Upon appeal from a judgment this court will review intermediate orders affecting the judgment, and we will first consider this order overruling these motions, as affecting the question of costs and
71 the rights of the parties appealing.

A consolidation of suits is only ordered where the parties, plain-

tiff and defendant, are the same in each, and the subject-matter such as may be joined; so that this was not properly a question of consolidation of the suits.

The practice and proceedings, however, under the act in question, are the same as in other civil actions. The remedies under it are twofold—an ordinary judgment, and, in the event no sufficient property be found, enforcement of the lien established, by sale of the property charged; as between themselves, the several lien-holders take priority in the order of filing their accounts and notices of lien with the county recorder.

Where seperate suits are commenced, the plaintiffs in which are not united in interest, and several judgments are sought, joinder of their actions would be improper, but in so far as the statute provides
72 for enforcement of the liens created by it against the same property in favor of several lien-holders, the action under it is in the nature of an equitable proceeding, and should be governed by the rules pertaining to such.

It is not necessary to determine at this time whether, in a suit instituted under the act, a party may recover a judgment at law for the amount found due to him, notwithstanding his failure to establish a lien therefor. So far as the liens are concerned, the several lien-holders are to be regarded as incumbrancers of the same property sought to be charged, and their respective rights adjudicated as such.

The "act securing liens to mechanics and others," provides that parties to the contract shall, and all others interested may, be made parties, but at the same time, the practice in other civil cases is
73 made applicable under it, and, under our practice, a defendant is required to answer the complaint, specifically, and also to set up as a counter claim any matter which entitles him to relief, either against the plaintiff, or any co-defendant. It is not permitted him, after the court has acquired jurisdiction over him in a cause either by service of summons or by voluntary appearance, to suffer a default, or fail to answer, and then institute a seperate action in which the same subject-matter and parties are involved. While different lien-holders need not, necessarily, be made defendants, unless it is sought to bind them by the decree, yet, if made defendants, as in this case, their rights must be adjudicated in one proceeding, so far as their several liens are concerned.

None of the parties in these causes have appealed to this court
74 except Germain, who appeals seperately in each, and Davis, who appeals in the proceeding in which Bilsland is plaintiff below.

There is manifest injury sustained by these appellants, in permitting each one of the defendants in this cause to maintain a seperate action for the enforcement of his lien, and in each entering a decree of sale of the property, when under our practice act, as well as under the established chancery practice, the rights of all should have been determined in one action, and the several claims established as liens, ordered satisfied out of the proceeds of one and the same sale of the property charged.

By the course pursued the appellants are not only harassed by multiplicity of suits, and subjected to accumulation of costs, but suffer from possible sacrafice of the property in consequence of the
75 twelve several sales ordered. It may be remarked, also, that the several lien-holders, although not appealing, sustain injury in consequence of the proceeding. It is claimed that each has the right to redeem from the preceeding sale or sales ordered, but this is not ade-

quate protection of his rights, and may be substantially a denial of them. Mechanics and material men are not always men of capital, and to require junior lien-holders to pay off all prior liens in order to protect their own liens, defeats the purpose of the "act."

We hold, therefore, that the court erred in overruling the motion of defendant Germain to require the defendants to submit their respective rights for adjudication in one action, but we feel authorized, as an appellate court, to correct this error, and to treat the several complaints filed as counter-claims set up by them respectively, and since the
76 motion of Germain was filed in each case, and since this action, in which Mason & Duke are plaintiffs, is the first cause on the calendar of this court, commenced on November 25, 1869, in the court below, we will regard said complaints as counter-claims in this cause, and will review the transcripts in the order in which they stand on this calendar, and having reference also to the date of filing below.

Before considering the questions raised in each case separately, we will first pass upon questions applicable to all equally. In each case defendant Germain appeals from the judgment rendered, and from the order overruling his motion for a new trial.

This he may do, but upon appeal from a judgment, not accompanied by a statement, this court will only review errors of law appear-
77 ing on the record itself, properly specified.

Upon a motion for a new trial there must be, in every instance, either a statement signed by the attorneys of the parties, or settled and certified by the judge, or affidavits showing the errors alleged. No question of fact will be considered in this court unless all the evidence relating thereto be embodied in, or definitely referred to in the statement; nor will any error of law be regarded unless material, and properly specified in the statement. Mere recitation in the transcript of what purports to be facts, or stipulations of attorneys, not embodied in, or distinctly identified by, the statement, will not be considered.

In this case, in every instance that which purports to be a "statement" is more properly a notice of a motion for a new trial, than a statement, and in no instance is the evidence embodied or defi-
78 nitely referred to, and hence it will be presumed in this court that the evidence was sufficient to support the finding of facts in the court below, and we will be confined to examination of errors in law appearing upon the record, and properly specified.

The several notices of appeal specify that the respective appeals are from the "findings" of the court below, as well as from the judgments and orders overruling the motions for a new trial; and we will remark that no appeal lies from the "findings" of a court which corresponds to the special verdict of a jury. The "statement" on the motion for a new trial, in each instance, specifies as grounds for the motion, in addition to error of law, and insufficiency of the evidence, "irregularity in the proceedings of the court."

79 The "irregularity" mentioned in the statute refers to irregularity in the proceedings not appearing on the face of the record, and must be shown by affidavit. The "irregularities" specified in the several statements are not of this character, but appear on the record, and we will so consider them.

In the case under consideration, wherein Mason & Duke are plaintiffs, the first error of law specified is the overruling of the demurrer of appellant Germain to the complaint. The demurrer we hold to have been properly overruled, as the facts stated constitute a cause of action. The order overruling the motion to require defendants to liti-

gate their respective rights in this proceeding, we have already considered, and the error assigned in rendering the decree of course depends upon the determination of the other questions presented.

The second ground of the motion for a new trial is "insuffi-
80 ciency of the evidence to support the findings and decree," but, as we have already stated, all the evidence not being preserved and embodied in the statement settled, we must presume in favor of the judgment below.

There appears in the transcript a stipulation, signed by the attorneys of the respective parties, as to the amount due plaintiffs, and also an entry reciting the examination of witness upon certain matters, and the allowance of $75 00 as damages by the court for a defective range and flue, but both of these, neither forming a part of the record nor being embodied in the statement, will be disregarded.

The fact that the complaint and notice of the lien claimed as due plaintiffs a larger amount than that found by the court, will not de-
stroy their lien for the amount actually due, unless there be a
81 fraudulent intent in filing the same, which must be proven, and will not be presumed.

Upon the other points specified, the evidence, necessary to sustain them not being preserved, the presumptions are in favor of the judgment below.

The court finds that the building in question was commenced May 21st, 1869; that thereafter plaintiffs, Mason & Drake, under a contract with the owner, defendant Germain, furnished material for, and performed labor on, the same, and within sixty days after completion of such contract, and on September 29th, 1869, at 2¼ o'clock, p. m., of said day, duly filed their notice of lien and account in the county clerk's office of said Lewis & Clark County, and that there was due plaintiffs therefor $5,215 46, for the payment of which they were decreed a lien on the property described.

82 In the case of John Bilsland, defendant Germain appeals from the order overruling his motion for a new trial; and defendant Davis appeals from the decree therein rendered as against him. Under our view the appeal of Davis, in this case, is as effectual as if he had appealed in all, and his rights and priority as mortgagee can be determined fully, and we will consider these questions hereafter.

In the order overruling Germain's motion for a new trial, a statement is referred to as having been settled by the court, although none is certified by the court. Some evidence is set out in the transcript, but it is not certified, nor does it purport to be all the evidence, and the presumptions favor the judgment below.

The error assigned in overruling the demurrer to the complaint,
83 and in admitting proof of, and sustaining the assignment of McKillican's lien to plaintiffs, we do not think well grounded.

While a lien is inchoate, and before the completion of the contract, an assignment of the claim for labor or materials would not carry a lien, but we can see no reason in law, public policy, or principle, why a lien, when perfected, should not follow the assignment of the claim on which it is founded.

The other errors assigned we have considered.

The court finds the plaintiff entitled to a lien for $2,064 75, and that he duly filed his notice of lien for $742 87½ on November 17th, 1869, at 2 o'clock p. m., and that McKillican at the same time duly filed notice of his lien for $1,242 50.

It is evident the court allowed interest upon these claims, and,

84 to sustain this ruling, it must be presumed there was evidence before it that the amounts were vexatiously withheld.

In the following cases no new questions are raised.

The court finds Clark, Conrad & Curtin entitled to a lien for $627 00, and that notice of lien was filed November 22, 1869; that D. B. Dressler is entitled to a lien for $566 50, and that notice of lien was filed November 17, 1869; that W'm B. Wilder is entitled to a lien for $1,505 75, and that notice of lien was filed November 17, 1869, by himself for $771 78; and on the same day, at 10 o'clock a. m., by John A. Murphy for $734 00, and that Murphy duly assigned his claim and lien therefor to Wilder; that John Shively is entitled to a lien for $400 00, and filed his notice of lien on November 17, 1869, at 11½ o'clock a. m.; that Barnes & Arnold are entitled to two liens: one for $5,277 68, notice of which was filed November 17, 1869, at 11½ a. m., and the other for
85 $1,037 87, notice of which was filed November 11th, 1869. In this case the court made John Kinna a party defendant on his own motion. Kinna filed his answer, setting up a lien on the property for work done upon, and materials furnished for, the same. This was proper practice. The "objections of appellant," though not properly presented, we will review.

The first is, that appellant was not served with process, and did not appear in such proceeding. The order made by the court making Kinna a defendant in the cause charged all the parties with notice, and no process was required. Each party, however, was entitled to service of a copy of his answer and counter-claim. If such copy was not served, and appellant desired to save the error, it should have been presented by affidavit as an irregularity, and in the absence of such affida-
86 vit it will be presumed, from the finding of the court, that a copy was duly served, which gave the court jurisdiction of the subject-matter of the counter-claim. The court finds defendant John Kinna entitled to a lien for $1,139 00, and that notice of lien was filed November 30th, 1869. The court also finds that Samuel Davenport is entitled to a lien for $480 00, and that he filed notice of lien November 17th, 1869; that E. L. Curry is entitled to a lien for $888 00, and that notice was filed November 17, 1869, at 2 o'clock p. m.; that R. S. Hale is entitled to a lien for $470 35, and filed notice November 15th, 1869; that Benjamin Daily filed notice of lien for $571 63 on January 12th, 1870, and is entitled to a lien for $590 00, which must include interest allowed for vexatious withholding; that D. B. McKellican is entitled to a lien for $526 00, and filed notice of lien December 8, 1869, at 5 o'clock p. m.

87 Upon the appeal of defendant Davis, the only question presented relates to the priority of the mortgage of the property in question executed to him by defendant Germain over the several liens established. Upon this point a majority of this court are of opinion that the statute expressly give preference to liens of mechanics and material men, over any incumbrances made subsequent to the commencement of the building; and that the court having found the fact that the building in question was commenced before the execution of said mortgage, all the liens found were properly preferred to it.

This cause is therefore remanded to the court below, and the judgments entered in favor of the plaintiffs, and the several defendants herein, for the respective amounts found due to them, are affirmed, and the costs of filing the several complaints, as answers in this
88 cause, and serving copies of the same, and such costs as were necessarily incurred by them in defense and assertion of their

several rights in this proceeding shall be ascertained and taxed by the court; and it is ordered and adjudged that the appellants Germain and Davis, respectively, recover from the several defendants herein the costs and charges incurred by them in answering and defending the several separate proceedings herein specified, to be taxed by the court. It is further ordered that special fieri facias executions issue in favor of said several parties for the said amounts for which said judgments were rendered, and their costs, by the court, if such executions have not heretofore issued, and that if no sufficient property of defendant Germain has been, or can be found, to satisfy the said several judgments and costs taxed, that then the residue of such judgments, or any
89 of them, be levied out of the said property described in the complaint, and that said property, or so much thereof as may be necessary, be sold, in accordance with law, to satisfy the same; and that out of the proceeds of such sale there be paid the costs of suit and sale; and thereafter the said judgments be paid and satisfied to the extent of such proceeds in the order of filing the said several accounts and notices of lien in the recorder's office, as found by the court, and that said several liens so found by the court be decreed to be prior and paramount to the mortgage executed by appellant Germain to appellant Davis, mentioned and set out in the answer of said Davis, and that the surplus, if any, be brought into court to await its further order.

H. L. WARREN, *C. J.*

90 *Dissent.*

I respectfully dissent from so much of the foregoing opinion as relates to the question of priority of Davis's mortgage over the several liens established.

The contracts under which the different claimants performed labor, or furnished material, were entirely separate and distinct one from the other, and, in my opinion, the priority of each must be determined by the date at which he, himself, commenced to fulfill his contract, and not by the commencement of some other work, under another contract, by another person, on the same building. The statute contemplates the completion of the building or erection under one contract, and in that event gives preference over any incumbrance made subsequent
91 to the commencement of the building or erection, but does not relate to several contracts, each of which is made with reference to incumbrances, as they exist at the time of commencing to fulfill them, respectively.

H. L. WARREN, *C. J.*

Filed November 15th, 1870.

I. R. ALDEN,
Clerk Sup. Court M. T.

And afterwards, to wit, on the 22nd day of November, A. D. 1870, the said defendant, G. Jules Germain, by his attorneys, Messrs. Woolfolk & Toole, filed with the clerk of said supreme court his writ of error for the appeal of said cause to the Supreme Court of the United States from the foregoing judgment, of which writ, in words and figures, the following is a copy, to wit:

UNITED STATES OF AMERICA, *ss:*

92 The President of the United States to the judges of the supreme court in and for the district of Montana Territory, greeting:

Because in the records and proceedings, as also in the rendition of the

judgment of a plea which is in the said supreme court before you, between James Mason and L. B. Duke, plaintiffs, and G. Jules Germain, et al., defendants, a manifest error hath happened, to the great damage of the said G. Jules Germain, one of said defendants as aforesaid, as by his complaint appears: We being willing that the error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein
93 given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the clerk of the supreme court for the district of Montana Territory, the 22nd day of November, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] I. R. ALDEN,
Clk of the Supreme Court in & for Montana Territory.

94 (Endorsed) Filed Nov. 22nd, '70. I. R. Alden, clerk.

And on the same day, November 22nd, 1870, the said defendant Germain filed with the clerk of said court his undertaking on appeal, of which in words and figures the following is a copy, to wit:

JAMES MASON AND L. B. DUKE, CO-PARTNERS in trade, doing and transacting business under the firm-name, and style of Mason & Duke, plaintiffs,

vs.

G. JULES GERMAIN, C. L. DAHLER, A. J. Davis, Henry Wyttenback, Jno. P. Barnes, W. W. Arnold, W'm Senior, George McBirney, D. P. Lake, R. S. Hale, Henry Parchen, W. L. Paynter, William P. Wilder,
95 John Murphy, Sam'l Davenport, John Shively, D. B. Dressler, W. B. McKillican, E. S. Curry, John Bilsland, A. G. Clarke, Thomas Conrad, and Jno. Curtin, defendants.

Supreme Court of the United States.

Whereas G. Jules Germain, one of the defendants in the above cause, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of Montana Territory; and also to reverse all the other judgments and decrees rendered at the same date against the said defendant by the said supreme court, and in favor of the following parties, to wit:

John Bilsland, plaintiff, vs. G. Jules Germain et al., defendants;
96 E. L. Curry vs. G. Jules Germain et al.; W'm P. Wilder vs. Germain et al.; Daniel B. Dressler vs. G. Jules Germain et al.; Sam-

uel Davenport vs. Germain et al.; John Shively vs. G. J. Germain et al.;
A. J. Clarke, Tho's Conrad, & Jno. Curtin, pl'ffs, vs. G. Jules
97 Germain et al.; Jno. P. Barnes & W. W. Arnold vs. G. Jules
Germain et al. and Jno. Kinna, intervenos; R. S. Hale vs. G. Jules Germain et al.; John Cook vs. G. Jules Germain et al.; Benjamin Daily vs. G. Jules Germain et al.; and D. B. McKillican vs. G. Jules Germain et al., defendants.

All the judgments and decrees in the aforesaid suits being ren-
98 dered in affirmance of the judgments and decrees of the district court of the 3rd judicial district of Montana Territory:

Now, therefore, we, the undersigned, in consideration of the premises and of said appeal, (all of the above cases being consolidated for the purpose of such appeal,) do hereby jointly and severally undertake and promise on the part of the appellant that he will pay all costs which may be awarded against him on said appeal, not exceeding the sum of one thousand dollars, to which amount we acknowledge ourselves jointly & severally bound.

And whereas the said appellant is desirous of staying the execution of the judgments and decrees appealed from in so far as they relate to certain premises known as the International Hotel, and more par-
99 ticularly described in the judgments and decrees hereby appealed from; and whereas the said supreme court of Montana has consolidated all the above-entitled suits and judgments therein for the purposes of appeal therefrom, and has fixed the bond necessary to stay proceedings in all the above causes as against said International Hotel at the sum of twenty-five thousand dollars, and has, moreover, provided that said amount might be embraced in one instrument for said purpose:

Now, therefore, in consideration thereof and of the premises, we do jointly and severally promise and acknowledge ourselves jointly and severally bound in the further sum of twenty-five thousand dollars, (being the amount so fixed as aforesaid by the supreme court for that purpose,) that during the possession of said premises by
100 appellant, or any one holding through or under him, he will not commit, or suffer to be committed, any waste thereon, and will pay all damages resulting to said International Hotel pending this appeal, from fine, not exceeding the said sum of twenty-five thousand dollars, so as aforesaid fixed by said supreme court, by which said judgment and decree were rendered.

CHA'S L. DAHLER. [SEAL.]
H'Y WYTTENBACH. [SEAL.]
HUGH KIRKENDALL. [SEAL.]

Sealed and delivered in the presence of—

COUNTY OF LEWIS & CLARKE,
Territory of Montana, ss:

Cha's L. Dahler, being first duly sworn, deposes and says that he is a resident and freeholder of the Territory of Montana, and that he is worth the sum of fifty thousand dollars over and above all his
101 debts and liabilities, exclusive of property exempt by law from execution.

CHA'S L. DAHLER.

Subscribed & sworn to before me, this 19th day of November, 1870.

[SEAL.] MASSENA BULLARD,
Notary Public.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

H. Wyttenbach, being first duly sworn, deposeth and saith that he is a resident and freeholder of the Territory of Montana, and that he is worth ten thousand dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

H'Y WITTENBACH.

Subscribed & sworn to before me this 19th day of November, A. D. 1870.

[SEAL.] MASSENA BULLARD,
Notary Public.

102 TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

Hugh Kirkendall, being first duly sworn, deposeth and saith that he is a resident and freeholder of the Territory of Montana, and that he is worth ten thousand dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

HUGH KIRKENDALL.

Subscribed & sworn to before me this 19th day of November, A. D. 1870.

[SEAL.] MASSENA BULLARD,
Notary Public.

Approved, and supersedeas granted by me this 19th day of November 1870.

G. G. SYMES,
Asso. Justice of Sup. Court.

Filed Nov. 22nd, 1870.

I. R. ALDEN, *Clerk.*

103 And afterwards, to wit, on the 25th day of November, A. D. 1870, the said defendant, G. Jules Germain, filed with the clerk of said supreme court, his citation, of which, in words and figures, the following is a copy, to wit:

JAMES MASON AND L. B. DUKE, PLAINTIFFS,
vs.
G. JULES GERMAIN, ET AL., DEFENDANTS.

UNITED STATES OF AMERICA, *ss:*

To the above-named plaintiffs or their attorneys, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the
104 first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein G. Jules Germain et al., are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable H. L. Warren, chief justice sup. court M. T., and G. G. Symes, associate justice of said supreme court.

COUNTY OF LEWIS & CLARKE,
Territory of Montana, ss:

P. B. Thomas, being first duly sworn, deposes and says, that he served the within citation by delivering a copy thereof to Messrs. Shober & Lowry and J. A. Johnston, att'ys for Messrs. Mason &
105 Duke. defendants in error. Also by delivering a copy of said citation to Messrs. Chumasero & Chadwick and J. J. Williams, being, with Messrs. Shober & Lowry, the attorneys of record for all the other parties in interest as against said G. J. Germain, except John Kinna and R. S. Hale, upon each of whom this affiant also served a copy of this citation.

Affiant further states that the aforesaid copies were delivered to the above-named parties on the 24th day of November, A. D. 1870, in Helena City, Montana Territory.

P. B. THOMAS.

Subscribed & sworn to before me, this 24th day of November, A. D. 1870.

[SEAL.] MASSENA BULLARD,
Notary Public.

(Endorsed:) "Filed November 25, 1870. I. R. Alden, clerk."

106 Supreme court of the Territory of Montana.

I, I. R. Alden, clerk of the supreme court of the Territory of Montana, do hereby certify the foregoing to be a full, true and comple transcript of the papers and proceedings in the case of Mason & Duke vs. G. Jules Germain et al., had in the third judicial district court, and also of the proceedings subsequently had on the appeal of said cause, in the supreme court of said Territory, as the same appear on file and of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Virginia City, in said Territory, this 2nd day of December, A. D. 1870.

[SEAL.] I. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 514. G. Jules Germain, plaintiff in error, vs. James Mason and L. B. Duke. Montana Terr'y, Sup. Court. Filed 27 February, 1871.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

—:-o-:—

G. JULES GERMAIN, PLAINTIFF IN ERROR,

vs.

JAMES MASON AND L. B. DUKE.

No. 290.

—:-o-:—

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

Motion to Dismiss.

The defendant in error moves to dismiss this writ of error on the ground that the same is not attested in the name of the Chief Justice, but in the name of the clerk of the Supreme Court of Montana.

J. HUBLEY ASHTON,
for Defendant in Error.

Points.

The writ of error bears the *teste* of the clerk of the Supreme Court of the Territory of Montana, and not the *teste* of the Chief Justice of this court. Printed Record, p. 29.

By the 1st section of the act of September 29, 1789, entitled "An act to regulate Process in the Courts of the United States," (1 Statutes at Large, 93,) it is provided

that "all writs and processes issuing from the Supreme or Circuit Court shall bear test of the Chief Justice of the Supreme Court."

The 1st section of the act of May 8, 1792, (1 Statutes at Large, 275, 276,) enacts that "all writs and processes issuing from the Supreme or Circuit Court shall bear test of the Chief Justice of the Supreme Court, (or if that office shall be vacant,) of the Associate Justice next in precedence."

In the case of Wells, Fargo & Co., plaintiffs in error, *vs.* A. McGregor, December 1, 1871, decided at this term of the court, the Chief Justice in pronouncing the opinion of the court, says:

"It appears also that the writ of error has the test of the Supreme Court of the Territory of Montana, and not the test of the Chief Justice of this court. But the statute makes the test of the Chief Justice indispensable, and we have no power to change its requirements."

Under this decision the writ of error in this case must be dismissed.

J. HUBLEY ASHTON,
NATH'L WILSON,
for Defendant in Error.